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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

-----X
ROSENBAUM CAPITAL LLC, *Individually*
and on behalf of all others similarly situated,

Plaintiff,

vs.

LUMINENT MORTGAGE CAPITAL, INC.,
GAIL P. SENECA, SEWELL TREZEVANT
MOORE, JR., and CHRISTOPHER J. ZYDA,

Defendants.

CASE NO.: 3:07-cv-04096-PJH

MEMORANDUM IN
SUPPORT OF DISTRICT
NO. 9, INTERNATIONAL
ASSOCIATION OF
MACHINISTS &
AEROSPACE WORKERS
PENSION TRUST'S MOTION
TO CONSOLIDATE
RELATED CASES, BE
APPOINTED AS LEAD
PLAINTIFF, AND FOR
APPROVAL OF ITS CHOICE
OF COUNSEL

Date: November 14, 2007

Time: 9:00 a.m.

Ctrm: 3

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MEMORANDUM IN SUPPORT MOTION TO CONSOLIDATE CASES, APPOINT LEAD
PLAINTIFF, AND APPROVE CHOICE OF COUNSEL CASE NO.: 3:07-cv-04096-PJH

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3	-----X		
4	HOWARD J. KAPLOWITZ IRA, <i>Individually</i>)	
5	<i>and on behalf of all others similarly situated,</i>)	CASE NO.: 3:07-cv-04140-PJH
6	Plaintiff,)	
7	vs.)	
8	LUMINENT MORTGAGE CAPITAL, INC.,)	
9	GAIL P. SENECA, SEWELL TREZEVANT)	
10	MOORE, JR., and CHRISTOPHER J. ZYDA,)	
11	Defendants.)	
12	-----X		
13	ELLIOT GREENBERG, <i>Individually and on</i>)	
14	<i>behalf of all others similarly situated,</i>)	CASE NO.: 3:07-cv-04141-PJH
15	Plaintiff,)	
16	vs.)	
17	LUMINENT MORTGAGE CAPITAL, INC.,)	
18	GAIL P. SENECA, SEWELL TREZEVANT)	
19	MOORE, JR., and CHRISTOPHER J. ZYDA,)	
20	Defendants.)	
21	-----X		
22	PEM RESOURCES LP, <i>Individually and on</i>)	
23	<i>behalf of all others similarly situated</i>)	CASE NO.: 3:07-cv-04184-PJH
24	Plaintiff,)	
25	vs.)	
26	LUMINENT MORTGAGE CAPITAL, INC.,)	
27	GAIL P. SENECA, SEWELL TREZEVANT)	
28	MOORE, JR., and CHRISTOPHER J. ZYDA,)	
	Defendants.)	

1)
2 -----X
3 -----X
4 ALLEN M. METZGER, *Individually and on*)
5 *behalf of all others similarly situated,*)
6 Plaintiff,) CASE NO.: 3:07-cv-04686-PJH
7 vs.)
8 LUMINENT MORTGAGE CAPITAL, INC.,)
9 GAIL P. SENECA, SEWELL TREZEVANT)
10 MOORE, JR., and CHRISTOPHER J. ZYDA,)
11 Defendants.)
12 -----X

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PRELIMINARY STATEMENT

Presently pending before the Court are five related securities class action lawsuits (the “Actions”) brought on behalf of all persons or entities (the “Class”) who purchased the securities of Luminent Mortgage Capital, Inc. (“Luminent” or the “Company”) during the period of October 10, 2006 through and including August 6, 2007 (the “Class Period”). Plaintiffs allege violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 promulgated under Section 10(b), against Defendants Luminent, Gail P. Seneca, Sewell Trezevant Moore, Jr., and Christopher J. Zyda (collectively, the “Individual Defendants”).

Class member District No. 9, International Association of Machinists and Aerospace Workers Pension Trust (“District No. 9”) hereby moves this Court, pursuant to Fed. R. Civ. P. 42(a) and Section 21D(a)(3)(B) of the Exchange Act, as amended by the Private Securities Litigation Reform Act of 1995 (“PSLRA”), for an order: (a) consolidating the captioned actions for all purposes; (b) appointing District No. 9 as lead plaintiff in the Actions; and (c) approving District No. 9’s choice of lead and liaison counsel.

During the Class Period, District No. 9 suffered losses of \$909,162. District No. 9 believes that its losses represent the largest financial interest in the outcome of the litigation.

STATEMENT OF FACTS

Plaintiffs charge Luminent and certain of its officers and directors with violations of the Exchange Act. Luminent is a real estate investment trust ("REIT"). The Company invests primarily in the United States agency and other single-family, adjustable-rate, hybrid adjustable-rate and fixed-rate mortgage-backed securities, which it acquires in the secondary market.

The complaints allege that during the Class Period, Defendants issued materially false and misleading statements regarding the Company's business and financial results. As a result of Defendants' false statements, Luminent stock traded at artificially inflated prices during the Class Period, which allowed the Defendants to complete an offering of common stock in October 2006 at \$10.25 per share and a \$90 million private placement of 8.125% Convertible Senior Notes due 2027 on May 30, 2007.

On August 6, 2007, after the market closed, the Company issued a press release announcing that the secondary market for mortgage loans and mortgage-backed securities had seized-up, and, as a result, Luminent was experiencing a significant increase in margin calls on its highest quality assets and a decrease on the financing advance rates provided by its lenders. On August 7, 2007, Luminent's stock collapsed \$3.30 per share to close at \$1.08 per share, a one-day decline of 75% on volume of 32.2 million shares, 25 times the average three-month volume.

According to the complaints, the true facts, which were known by the Defendants but concealed from the investing public during the Class Period, were as follows: (a) the Company lacked requisite internal controls, and, as a result, the Company's projections and reported results issued during the Class Period were based upon defective assumptions and/or manipulated facts; (b) the Company's investments in mortgage loans were not all "high quality" as claimed by Defendants, nor was its hedging disciplined and sophisticated as to credit risk; and (c) the Company was not on track to report the earnings forecast or to pay the dividends promised.

ARGUMENT

I. THE RELATED ACTIONS SHOULD BE CONSOLIDATED

Consolidation pursuant to Rule 42(a) is proper when actions involve common questions of law and fact. *See Casden v. HPL Techs., Inc.*, No. C-02-3510-VRW, 2003 U.S. Dist. LEXIS 19606, at *4-*5 (N.D. Cal. Sept. 29, 2003). Courts recognize that class action shareholder suits are ideally suited to consolidation because their unification expedites proceedings, reduces duplication, and minimizes the expenditure of time and money by all concerned. *See Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146, 1150 (N.D. Cal. 1999) ("It seems obvious that fifty-four separate class actions predicated on the same set of misstatements by corporate officials, causing an artificial inflation and then a corrective drop in share prices, present common questions of fact.").

1 The Actions pending before this Court present similar factual and legal issues,
2 as they all involve the same subject matter, and present the same legal issues. Each
3 alleges the same violations of the Exchange Act, and is based on the same wrongful
4 course of conduct. Each names the Company and certain of its officers and/or
5 directors as Defendants. Because the Actions arise from the same facts and
6 circumstances and involve the same subject matter, the same discovery and similar
7 class certification issues will be relevant to all related actions.
8
9

10
11 Accordingly, consolidation under Rule 42(a) is appropriate.
12

13 **A. The Court Should Resolve The Consolidation Issue**
14 **As A Prerequisite To The Determination Of Lead Plaintiff**

15 Once the Court decides the consolidation motion, it must decide the lead
16 plaintiff issue “[a]s soon as practicable.” Section 21D(a)(3)(B)(ii), 15 U.S.C. § 78u-
17 4(a)(3)(B)(ii). As District No. 9 has an interest in moving these actions forward, it
18 respectfully urges the Court to resolve the consolidation motion as soon as practicable.
19 A prompt determination is reasonable and warranted under Rule 42(a), especially
20 given the common questions of fact and law presented by the related actions now
21 pending in this District.
22
23

24 ///

25 ///

1 **II. THE COURT SHOULD APPOINT DISTRICT NO. 9 AS LEAD**
 2 **PLAINTIFF**

3 **A. The Procedure Required By The PSLRA**

4 The PSLRA establishes the procedure for appointment of the lead plaintiff in
 5 “each private action arising under [the Exchange Act] that is brought as a plaintiff
 6 class action pursuant to the Federal Rules of Civil Procedure.” Sections 21D(a)(1)
 7 and 21D(a)(3)(B), 15 U.S.C. §§ 78u-4(a)(1) and (a)(3)(B).
 8

9
 10 First, the plaintiff who files the initial action must publish notice to the class
 11 within 20 days after filing the action, informing class members of their right to file a
 12 motion for appointment of lead plaintiff. Section 21D(a)(3)(A)(i), 15 U.S.C. § 78u-
 13 4(a)(3)(A)(i). The PSLRA requires the court to consider within 90 days all motions,
 14 filed within 60 days after publication of that notice, made by any person or group of
 15 persons who are members of the proposed class to be appointed lead plaintiff.
 16
 17 Sections 21D(a)(3)(A)(i)(II) and 21D(a)(3)(B)(i), 15 U.S.C. §§ 78u-4(a)(3)(A)(i)(II)
 18 and (a)(3)(B)(i).
 19
 20

21 The PSLRA provides a presumption that the most “adequate plaintiff” to serve
 22 as lead plaintiff is the “person or group of persons” that:
 23

- 24 (aa) has either filed the complaint or made a motion in response
 25 to a notice;
 26 (bb) in the determination of the court, has the largest financial
 27 interest in the relief sought by the class; and
 28

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

Section 21D(a)(3)(B)(iii)(I), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). The presumption may be rebutted only upon proof by a class member that the presumptively most adequate plaintiff “will not fairly and adequately protect the interests of the class” or “is subject to unique defenses that render such plaintiff incapable of adequately representing the class.” Section 21D(a)(3)(B)(iii)(II), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

As set forth below, District No. 9 satisfies the foregoing criteria and is not aware of any unique defenses that Defendants could raise against it. Therefore, District No. 9 is entitled to the presumption that it is the most adequate lead plaintiff to represent Plaintiffs and, as a result, should be appointed lead plaintiff in the Actions.

1. District No. 9 Is Willing To Serve As Class Representative

On August 8, 2007, counsel in the first-filed action caused a notice (the “Notice”) to be published pursuant to Section 21D(a)(3)(A)(i), which announced that a securities class action had been filed against Luminent and the Individual Defendants, and which advised putative class members that they had until October 8, 2007 to file a motion to seek appointment as a lead plaintiff in the action.¹ District No. 9 has reviewed one of the complaints filed in the pending actions and has timely

¹ On August 8, 2007, the Notice was published over *Prime Newswire*. See Declaration of Michael Goldberg (“Goldberg Decl.”) Ex. C.

1 filed its motion pursuant to the Notice.² In doing so, District No. 9 has attached its
 2 certification attesting to its willingness to serve as a representative party of the Class
 3 and provide testimony at deposition and trial, if necessary. *See* Goldberg Decl. Ex. A.
 4 Accordingly, District No. 9 satisfies the first requirement to serve as lead plaintiff.
 5
 6 Section 21D(a)(3)(B)(iii)(I)(aa), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(aa).
 7

8 **2. District No. 9 Is An Institutional Investor With The**
 9 **Largest Financial Interest In The Relief Sought By The Class**

10 Under the PSLRA, any member of the purported class may move for
 11 appointment as lead plaintiff within 60 days of the publication of notice that the action
 12 has been filed. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i)(II). Subsequently, the court “shall
 13 appoint as lead plaintiff the member or members of the purported plaintiff class that
 14 the court determines to be most capable of adequately representing the interests of the
 15 class members” 15 U.S.C. § 78u-4(a)(3)(B)(i).
 16
 17

18 The legislative history of the PSLRA demonstrates that it was intended to
 19 encourage institutional investors, such as District No. 9, to serve as lead plaintiff. The
 20 explanatory report accompanying the PSLRA’s enactment specifically states that:
 21
 22

23 ² Computed from plaintiff’s August 8, 2007, notice of pendency, the 60-day period
 24 for filing motions for appointment of lead plaintiff ended Monday, October 8, 2007.
 25 Not including the October 8 federal observance of Columbus Day, Movant is filing
 26 the instant motion pursuant to F.R.Civ.P. 6(a), which provides in relevant part that “in
 27 computing any period of time prescribed or allowed by these rules...[t]he last day of
 28 the period so computed shall be included, *unless it is a Saturday, a Sunday, or a legal holiday*...in which event the period runs until the end of the next day which is not one
 of the aforementioned days. ...” (Emphasis added.)

The Conference Committee seeks to increase the likelihood that institutional investors will serve as lead plaintiffs by requiring courts to presume that the member of the purported class with the largest financial stake in the relief sought is the “most adequate plaintiff.”

* * *

The Conference Committee believes that . . . in many cases the beneficiaries of pension funds - small investors - ultimately have the greatest stake in the outcome of the lawsuit. Cumulatively, these small investors represent a single large investor interest. Institutional investors and other class members with large amounts at stake will represent the interests of the plaintiff class more effectively than class members with small amounts at stake.

H.R. Rep. No. 104-369, at 34 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 733.

This Court, as well as others around the country, have noted a Congressional preference to appoint institutional investors. *See, e.g., Miller v. Ventro Corp.*, No. 01-CV-1287, 2001 WL 34497752, at *6 (N.D. Cal. Nov. 28, 2001) (“It was hoped that including a presumption in favor of the largest stakeholder would give preference to institutional investors which would be in a better position to manage the litigation and to limit the influence of lawyers”); *Bowman v. Legato Sys.*, 195 F.R.D. 655, 657 (N.D. Cal. 2000) (institutional investors are “exactly the type of lead plaintiff envisioned by Congress when it instituted the [PSLRA] lead plaintiff requirements . . . ”); *In re Network Assocs. Sec. Litig.*, 76 F. Supp. 2d 1017, 1020 (N.D. Cal. 1999) (“Congress expected that the lead plaintiff would normally be an institutional investor”); *Ravens v. Iftikar*, 174 F.R.D. 651, 661 (N.D. Cal. 1997) (stating that Congress wanted to encourage large, sophisticated institutional investors to direct securities class actions,

1 thereby supplanting the prior regime of “figurehead plaintiffs who exercise no
2 meaningful supervision of litigation.”).³
3

4 Indeed, Congress deemed institutional investors “presumptively most adequate
5 to serve as lead plaintiffs in securities class actions.” *Greebel v. FTP Software, Inc.*,
6 939 F. Supp. 57, 63 (D. Mass. 1996). Furthermore, Congress believed that
7 “increasing the role of institutional investors in class actions [would] ultimately
8 benefit shareholders and assist courts by improving the quality of representation in
9 securities class action.” *In re Baan Co. Sec. Litig.*, 186 F.R.D. 214, 221 (D.D.C.
10 1999). Congress reasoned that the empowerment of institutional investors would
11 result in the appointment of lead plaintiffs that can best prosecute the claims and are
12 best able to negotiate with and oversee counsel. *See In re Razorfish, Inc. Sec. Litig.*,
13 143 F. Supp. 2d 304, 309 (S.D.N.Y. 2001) (stating that Congress intended that
14 “institutional plaintiffs with expertise in the securities market and real financial
15 interests in the integrity of the market would control the litigation . . .”); *Gluck v.*
16 *CellStar Corp.*, 976 F. Supp. 542, 548 (N.D. Tex. 1997) (“The legislative history of
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23 ³ See also *Schulman v. Lumenis, Ltd.*, No. 02 CIV. 1989 (DAB), 2003 WL 21415287, at *2
24 (S.D.N.Y. June 18, 2003) (one purpose behind the PSLRA is “to ensure that ‘parties with significant
25 holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will
26 participate in the litigation and exercise control over the selection and actions of plaintiff’s
27 counsel.”) (citation omitted). “Congress believed that this could best be achieved by encouraging
28 institutional investors to serve as lead plaintiffs.” *Id.* See also *In re Cendant Corp. Sec. Litig.*, 264
F.3d 201, 244 (3d Cir. 2001), *aff’d*, 404 F.3d 173 (2005) (“Congress anticipated and intended that
[institutional investors] would serve as lead plaintiffs.”).

1 the Reform Act is replete with statements of Congress' desire to put control of such
 2 litigation in the hands of large, institutional investors.”).

3
 4 This presumption is rooted in Congress' belief that “increasing the role of
 5 institutional investors in class actions will ultimately benefit the class and assist the
 6 courts.” S. Rep. No. 104-98, at 11 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 679,
 7 690. In reaching this conclusion, Congress reasoned that:

8
 9
 10 Institutions' large stakes give them an incentive to monitor, and
 11 institutions have or readily could develop the expertise necessary
 12 to assess whether plaintiffs' attorneys are acting as faithful
 champions for the plaintiff class.

13 Elliot J. Weiss & John S. Beckerman, *Let The Money Do The Monitoring: How*
 14 *Institutional Investors Can Reduce Agency Costs In Securities Class Actions*, 104
 15 Yale L.J. 2053, 2095 (1995) (“Weiss & Beckerman”). *See also* S. Rep. No. 104-98, at
 16 11 n.32 (noting that Weiss & Beckerman provided “the basis for the ‘most adequate
 17 plaintiff’ provision.”).

18
 19
 20 District No. 9 is ideally suited for the role as lead plaintiff. District No. 9 lost
 21 approximately \$909,162 in Luminent common stock during the Class Period. *See*
 22 Goldberg Decl. Ex. B. As a large institutional investor with significant resources
 23 dedicated to overseeing and supervising the prosecution of the litigation, District No.
 24 9 will be able to actively represent the Class and “drive the litigation” to ensure that
 25 the Class obtains the best recovery possible and implement corporate governance
 26
 27
 28

changes to correct the environment which allowed this fraud to take place and to prevent a recurrence ever again. *See Gluck*, 976 F. Supp. at 549 (citation omitted).

3. **District No. 9 Satisfies The Requirements Of Rule 23(a) Of The Federal Rules Of Civil Procedure**

Section 21D(a)(3)(B)(iii)(I)(cc) of the PSLRA also states that at the outset of the litigation, the lead plaintiff must also “otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc).

With respect to the qualifications of a class representative, Rule 23(a) requires generally that representatives’ claims be typical of those of the class, and that representatives will fairly and adequately protect the interests of the class. *See In re Cavanaugh*, 306 F.3d 726, 730 (9th Cir. 2002); *Ferrari v. Gisch*, 225 F.R.D. 599, 606 (C.D. Cal. 2004); *Ruland v. InfoSonics Corp.*, No. 06CV1231, 2006 WL 3746716, at *2 (S.D. Cal. Oct. 23, 2006).

Claims are “typical” under Rule 23 if they are “reasonably co-extensive with those of absent class members; they need not be substantially identical.” *Ferrari*, 225 F.R.D. at 606 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)). Likewise, Rule 23(a) also requires that the person(s) representing the class be able to “fairly and adequately protect the interests’ of all members in the class.” *Ferrari*, 225 F.R.D. at 607 (citation omitted).

1 The claims asserted by District No. 9 are typical of those of the Class. District
2 No. 9, like the members of the Class, acquired shares of Luminent during the Class
3 Period at prices artificially inflated by Defendants' materially false and misleading
4 statements, and was damaged thereby. Thus, its claims are typical, if not identical, to
5 those of the other members of the Class because District No. 9 suffered losses similar
6 to those of other Class members and its losses result from Defendants' common
7 course of conduct. Accordingly, District No. 9 satisfies the typicality requirement of
8 Rule 23(a)(3).
9
10
11

12 District No. 9 is an adequate representative for the Class. There is no
13 antagonism between its interests and those of the Class. Moreover, District No. 9 has
14 retained counsel highly experienced in prosecuting securities class actions, and will
15 submit its choice to the Court for approval pursuant to Section 21D(a)(3)(B)(v), 15
16 U.S.C. § 78u-4(a)(3)(B)(v).
17
18

19 Accordingly, at this stage of the proceedings, District No. 9 has made the
20 preliminary showing necessary to satisfy the typicality and adequacy requirements of
21 Rule 23 and, therefore, satisfies Section 21D(a)(3)(B)(iii)(I)(cc), 15 U.S.C. § 78u-
22 4(a)(3)(B)(iii)(I)(cc).
23
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28

1 **III. DISTRICT NO. 9'S CHOICE OF COUNSEL SHOULD BE APPROVED**

2 The PSLRA vests authority in the lead plaintiff to select and retain lead
 3 counsel, subject to court approval. Section 21D(a)(3)(B)(v), 15 U.S.C. § 78u-
 4 4(a)(3)(B)(v); Section 21D(a)(3)(B)(v), 15 U.S.C. § 78u-4(a)(3)(B)(v). The Court
 5 should interfere with the lead plaintiff's selection of counsel only when necessary "to
 6 protect the interests of the class." Section 21D(a)(3)(B)(iii)(II)(aa), 15 U.S.C. § 78u-
 7 4(a)(3)(B)(iii)(II)(aa); Section 21D(a)(3)(B)(iii)(II)(aa), 15 U.S.C. § 78u-
 8 4(a)(3)(B)(iii)(II)(aa).

9 District No. 9 has selected and retained Bernstein Liebhard & Lifshitz, LLP
 10 ("Bernstein Liebhard") as the proposed lead counsel and Glancy Binkow & Goldberg,
 11 LLP ("Glancy Binkow") as proposed liaison counsel for the Class. Bernstein
 12 Liebhard and Glancy Binkow have extensive experience prosecuting complex
 13 securities class actions, such as this one, and are well qualified to represent the Class.
 14 See Goldberg Decl. Exs. D and E for the firm resumes of Bernstein Liebhard and
 15 Glancy Binkow. As a result, the Court may be assured that by approving Bernstein
 16 Liebhard as lead counsel and Glancy Binkow as liaison counsel, the Class is receiving
 17 the best legal representation available.

18 **CONCLUSION**

19 For the foregoing reasons, District No. 9 respectfully requests that this Court:
 20 (1) consolidate the captioned, and all subsequently-filed, related actions; (2) appoint
 21 District No. 9 as lead plaintiff for the Class in the Actions and all subsequently-filed,
 22

1 related actions; and (3) approve Bernstein Liebhard as lead counsel and Glancy
2 Binkow as liaison counsel, respectively, for the Class.
3

4 DATED: October 9, 2007

Respectfully submitted,

5
6 /s/ *Michael Goldberg*

7
8 Lionel Z. Glancy
Michael Goldberg
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12 **Liaison Counsel for District No. 9**

13
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19
20 **Attorneys for District No. 9**